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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 139

THE PEOPLE OF THE STATE OF NEW YORK UPON THE RELATION OF RICHARD REID ROGERS,
Appellant,

vs.

MARK GRAVES, JOHN J. MERRILL AND JOHN P. HENNESSEY, AS COMMISSIONERS CONSTITUTING THE STATE TAX COMMISSION OF THE STATE OF NEW YORK.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK.

APPELLANT'S REPLY TO THE MOTION TO DISMISS OR AFFIRM.

RICHARD REID ROGERS, *Pro se.*

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 139

THE PEOPLE OF THE STATE OF NEW YORK UPON THE RELATION OF RICHARD REID ROGERS,
Appellant,

against

MARK GRAVES, JOHN J. MERRILL AND JOHN P. HENNESSEY, AS COMMISSIONERS CONSTITUTING THE STATE TAX COMMISSION OF THE STATE OF NEW YORK,
Appellees.

APPELLANT'S BRIEF IN REPLY TO STATEMENT OPPOSING JURISDICTION.

The only question discussed in the Appellate Division, as the appellee admits in his statement opposing jurisdiction, was the constitutional question. He is frank to admit, moreover, that the contention that the appellant was an independent contractor was not strenuously urged in the Court of Appeals. What occurred in that connection was this:

The appellant's case was a test case, because not only his annual salary as General Counsel was involved, but also

the salaries of other officers of the Panama Rail Road Company. With the appellee's permission, this statement was made in open court. At the end of the argument, when the Assistant Attorney-General raised the point of independent contractor, the following colloquy took place between the bench and the Assistant Attorney-General.

> Judge Lehman: "You do not wish the case decided upon that point?"
>
> Assistant Attorney-General: "No, we want a decision upon the merits."

In the cases cited by the Attorney-General (see *Lynch* v. *New York*, 293 U. S. 53, 54; *Cuyahoga River Power Co.* v. *Northern Realty Co.*, 244 U. S. 300, 304), the judgments below were rested upon *two* grounds, one Federal and one not Federal, and that circumstance was stressed. In the last-cited case this Court expressly said that "*in the absence of an opinion by the court below*, it was impossible to say whether its judgment rested upon State questions adequate to sustain it."

In the case at bar, no other question was raised by the petition for *certiorari* than the constitutional question; the Appellate Division, to which the writ was returned, dealt with no other; and the judgment of that court was rested solely upon the constitutional ground.

But even if the argument as to an independent contractor had been raised by the evidence, as it was not pressed or even decided the constitutional question would still have been involved.

Respectfully submitted,

RICHARD REID ROGERS,
Appellant, Pro se.

(7933-C)